

# Why Robert Spano should resign as President of the ECtHR

---

Dilek Kurban

2020-09-09T16:19:29

On 3-5 September 2020, the ECtHR's new president Robert Spano paid an official visit to Turkey. Spano's visit is scandalous for multiple reasons and has caused serious damage to the reputation of the ECtHR that warrants his resignation.

## Not the perfect timing, is it Mr. President?

The first ever visit by an ECtHR president to Turkey came at a time when the country is in the grips of an increasingly autocratic regime. Judge Spano knows very well that Recep Tayyip Erdoğan has eradicated any remnant of judicial independence and the rule of law in Turkey. He knows because until last year, he was the President of the ECtHR's Second Section which oversees the case law against Turkey. Spano has experienced first-hand how new applications from Turkey skyrocketed after the July 2016 coup attempt against Erdoğan; [8,300 in 2016 \(nearly four times as many as in 2015\) and 25,978 in 2017](#) alone. The list of new petitioners is long: civil servants purged without any evidence of involvement in the coup attempt; parliamentarians, journalists, judges, civil society activists arrested, prosecuted and convicted on dubious terrorism charges; individuals whose life savings, pensions, properties and passports were confiscated without a shred of due process.

The judiciary was also dismantled. According to an [ECtHR judgment](#) issued during Spano's section presidency, on 16 July 2016 alone (only one day after the coup attempt), some 3,000 judges and prosecutors were arrested and subsequently detained. Spano is perfectly aware that none of this would have been possible without the complicity of Turkish courts. For reasons of fear, duress, ideological bias or personal grudge, judicial authorities authorized the purge and arrest of anyone and everyone believed to be remotely linked to the Gülen movement, which Erdoğan declared to be the culprit within hours of the coup attempt. In a matter of few weeks, the Turkish Constitutional Court (TCC) gave its blessing to Erdoğan's crackdown, dismissing two of its own members without any evidence of their involvement with the Gülenists, let alone in the coup attempt. According to the TCC, the "conviction" of the remaining judges was sufficient. As the Venice Commission noted, from then on there would be ["little chance of success"](#) for lower-level judges and prosecutors to challenge their dismissals before the Turkish courts. A favorable ECtHR ruling would not change this reality. In its July 2020 ruling in [Yıldırım Turan](#), the TCC unanimously dismissed the complaint of a lower court judge held in pre-trial detention since July 2016, notwithstanding the ECtHR's 2019 [Alparslan Altan v. Turkey](#) judgment finding, after nearly three years, an Article 5(1) violation in the pre-trial detention of a former TCC judge. In defying the ECtHR precedent, the TCC declared itself to be "much better situated" than the Strasbourg court for interpreting

national law. The TCC thus effectively declared its intention to selectively follow the ECtHR case law – at least as far as post-coup purges are concerned.

## An ECtHR President in Turkey

Evidently, Spano carried out this visit to personally communicate to the authorities their obligations under the European Convention system through a [lecture](#) on judicial independence at the Justice Academy in Ankara, a [talk](#) on academic freedom at Istanbul University and a [conference](#) on freedom of religion at Artuklu University in Mardin. In addressing judges and prosecutors, Spano stressed the indispensability of judicial independence and impartiality for the rule of law, and emphasized in this regard the importance of training judges on human rights standards. In his lecture to legal scholars, he emphasized the importance of high-quality legal education. And in addressing the provincial representatives of the national government in Mardin, he underscored the importance of protecting religious freedom and minority rights in democratic societies. To bring home his message, Spano highlighted an ECtHR ruling on each theme. On judicial independence, he singled out the TCC's reaction to the *Alparslan Altan* ruling, setting the record straight by reminding that the ECtHR's mandate includes and indeed requires the interpretation of domestic laws. On academic freedom, he recalled *Kula v. Turkey* where the ECtHR found the sanctioning of an academic for participating in a TC program without his superior's authorization to infringe freedom of expression. This time, he expressed his happiness that this judgment "[found] its expression" in a TCC judgment of July 2019 (not citing the judgment or summarizing the issue and the ruling in the case). As for religious freedom, he underscored the state's duty of neutrality in reference to the Grand Chamber's 2016 ruling in *Izzettin Doğan and Others v. Turkey*, where the ECtHR found, among others, that members of the Alevi religious faith in Turkey "[suffered discrimination as compared with the followers of the majority version of Sunni Islam, who benefited from ... rights and services](#)" such as the ability to build places of worship, to receive subsidies and to have their places of worship recognized under the law.

In a nutshell, Spano delivered the remarks that a legal scholar specialized on the ECtHR would at an academic conference. He is, however, no longer a law professor. He was speaking in his capacity as the ECtHR President and addressing the judicial, executive and administrative authorities of a signatory state who have been systematically defying the ECHR with their rulings, decisions and practices. And not because they did not know any better; the Council of Europe and the EU have been training thousands of Turkish judges and prosecutors since the early 1990s. Those in positions of power in Turkey, from Erdoğan to rectors of public universities, know exactly what they are doing. Does President Spano really think that the TCC's President Zühtü Arslan, a hitherto renowned legal scholar specialized in the ECHR system before his appointment to Turkey's highest court, would have not voted for the dismissal of his colleagues on the whim of the regime and openly defied the ECtHR's authority with the *Yıldırım Turan* judgment had he received more training on ECtHR jurisprudence?

Let's now walk through the [TCC ruling](#) concerning academic freedom that Spano alluded to. The case does not concern the over 6,000 academics purged from Turkish universities since the failed coup, but a distinct group of academics, who had started to be purged *before* the coup attempt for having signed a petition (along with over 1,000 others) accusing the government of [“deliberate massacre and deportation”](#) of civilians in the Kurdish region. Hundreds were fired from their jobs, had their (and sometimes their spouses' and children's) passports cancelled, preventing them from finding academic jobs abroad, and were banned from finding other jobs in Turkey, including in the private sector. In other words, they faced [“civil death”](#) solely for signing a petition. The TCC ruling did not address any of these issues. It is limited to the criminal conviction of nine of these academics on charges of spreading terrorist propaganda. Moreover, the judgment was passed with an extremely narrow vote; eight assenting and eight dissenting votes, with the president's vote bringing the decisive result. The TCC found the applicants' freedom of expression to have been violated, awarded them monetary compensation and ordered lower courts to conduct retrials. The judgment is of course important; it implicates nearly 800 academics currently facing prosecution and will (hopefully) lead to their acquittal after over three years. But it does not make the TCC the bastion of ECHR norms in Turkey.

More problematic even is Spano's discussion of *#zzettin Do#an and Others*. In this landmark judgment, the Grand Chamber had found Turkey's policies towards the Alevi religious minority as a whole to violate not only freedom of religion under Article 9 but also to constitute discrimination under Article 14. From imposing on all 'Muslim' pupils mandatory religion courses in secondary education to refusing to grant Alevi places of worship (*cemevis*) the exemption from paying electricity bills granted to Sunni places of worship (mosques), from refusing to grant legal status to *cemevis* to not allowing the training of Alevi religious leaders (*dedes*), Turkey infringed its duty of neutrality and equal treatment to its Alevi citizens. This was in 2016. As of 5 September 2020, when Spano reiterated the state's duty of neutrality and impartiality in the realm of religion, all of these policies were still in effect. And yet, President Spano did not say a word about Turkey's non-compliance with a Grand Chamber ruling.

## Used for public display

So far, Spano could be excused or even perhaps justified for trying to appeal to Turkish authorities without antagonizing them. But, for reasons of political inexperience, naïveté or, worst, a belief that Turkey should not be held to the same standards as liberal democracies, he allowed himself to be used for public display by Erdo#an's regime.

Spano could have limited his visit to meetings with his counterparts in the Turkish judiciary. He did not have to meet with Erdo#an. But he did – arguably with the hope to talk some sense into him. In reality, in [posing with Erdo#an](#) he ended up legitimizing the 'Turkish-style presidency' introduced in 2017 which [vested](#) Erdo#an with the powers to, among others, dissolve the Parliament on any ground, issue decrees exempt from constitutional review and declare a state of emergency – a

move which the Council of Europe's own Venice Commission considered to be a decisive move ["towards an authoritarian and personal regime"](#).

Spano could have spoken on academic freedom at an institution which respects that principle. But he chose Istanbul University, which [expelled over 200 academics](#) pursuant to executive decrees issued by the regime. He must know this because the list includes the husband of his former colleague I##I Karaka#, who served with Spano at the Second Section until 2019. Most notably, Spano accepted an honorary doctorate from that university. In his [open letter](#), Professor Mehmet Altan, who was dismissed from Istanbul University after thirty years of teaching, reminded President Spano that he now shared the ["honour"](#) with Kenan Evren, the junta leader who staged the 1980 coup d'état and led the military regime for the next three years. In [another post](#) on this blog, I had discussed the ECtHR's judgment finding Altan's prolonged pre-trial detention to violate Article 5(1). Although Turkish courts finally acquitted him after resisting to comply with the ECtHR ruling for nearly twenty months, Altan is still fighting to get his job back. In his letter, Altan made a striking reminder to Spano: "These proceedings are ongoing and it is likely that they will also be brought before the ECtHR that you preside over. But in the meantime you will have become a Judge who has received an honorary doctorate from Istanbul University."

I am not one who rushes to call individuals to resign any time they violate their professional duties or ethical principles governing their jobs. But one [photograph](#) that appeared on the social media at the end of Spano's visit leaves no doubt, in my opinion, that he is no longer qualified for his post. The photo was taken in Mardin, on the steps of a high school. Spano is seen standing next to Saadet Yüksel, the recently elected ECtHR judge in respect of Turkey. We find out from news reports that Yüksel's parents donated the funds for the construction of the school building in their hometown (is this why Spano visited Mardin out of Turkey's remaining 79 provinces other than the capital and Istanbul?). The gentleman to Yüksel's left is her brother [Cüneyt Yüksel](#), a former member of the parliament from Erdogan's ruling Justice and Development Party (AKP) and currently holding the party's vice-chairmanship on political and legal affairs. The other woman in the photo is reportedly the head of AKP's provincial branch in Mardin. Among the officials that Spano met during his Mardin visit is Mahmut Demirta# who is currently both the (government appointed) [governor](#) and current [mayor](#) of Mardin.

This single photograph raises so many ethical questions. Why was this school visit even on Spano's agenda? It is evident from Spano's lectures that he has developed a [close friendship](#) with Yüksel – so much so that he seems to have let Judge Yüksel determine the agenda of his entire trip. After all, Mardin is Yüksel's hometown, before being elected to the ECtHR she was a member of the faculty at Istanbul Law Faculty, and there she is standing next to her politician brother. Is it ethical for the ECtHR President to conduct private visits during an official visit? More significantly, however, why did he meet with several representatives of the ruling political party when he did not get together with a single representative of any of the opposition parties in Turkey? This photo gives the impression that Spano's host in Turkey was not the Turkish government, but the AKP.

But that is not all. Governor/mayor Mahmut Demirtaş personifies an unlawful policy put in place by the Erdoğan regime to grasp by executive force the local governance of a significant part of the Kurdish region that it had been unable to gain through electoral means. His target were mayors elected to office from the pro-Kurdish Peoples' Democratic Party (HDP). In September 2016, taking advantage of the coup attempt to further curb democratic opposition, Erdoğan adopted an [emergency decree](#) authorizing the government to dismiss, arrest or ban from public office mayors and municipal officials accused of terrorism and to replace them with appointed bureaucrats (trustees). According to information I obtained from the HDP, by September 2019, ninety-three HDP mayors and deputy mayors were in pre-trial detention and eighty-four of the 100 HDP mayors had been replaced by AKP-appointed trustees. Mahmut Demirtaş is one of them. And in this case, the AKP seems to not even have bothered to keep up appearances, having Demirtaş continue to serve as governor while also serving as a mayor. Truly amazing. By meeting and posing with Demirtaş, Spano not only effectively endorsed the unconstitutional executive takeover of a democratically elected office, but also sent an extremely worrisome message to former HDP mayors whose cases are either pending before the ECtHR or will soon arrive there. How can they be assured of [“the possibility of a remedy before an independent and impartial court”](#)?

## An untenable position

With so many ethical errors of judgment in the course of one trip, and so many instances where Spano engaged with institutions and politicians who are deeply implicated in cases that are or will come before the ECtHR under his Presidency, he has made his position at the Court untenable. One cannot be the President of a court and receive an honorary doctorate from a university that has dismissed academics whose cases are pending before the ECtHR; one cannot absolve photo opportunities with government-appointed trustees who have replaced democratically elected mayors, whose cases are on the ECtHR's docket; one cannot pay private favours to Turkey's judge on the ECtHR by paying a visit to a school funded by her parents; one cannot meet with ruling AKP politicians without meeting any member of the opposition. By doing all these things, Judge Spano has not only shown that he lacks awareness of the ethical standards required by his job, but has also tainted the reputation of neutrality of the ECtHR to such an extent that Turkish plaintiffs can no longer feel that the Court under his leadership can guarantee a fair and impartial trial. Judge Spano should therefore do what is best for the ECtHR and its credibility: he should resign.

—

For a detailed analysis of the ECHR system's complex engagement with Turkey since the 1950s, see the author's upcoming book titled [Limits of Supranational Justice: The European Court of Human Rights and Turkey's Kurdish Conflict \(CUP 2020\)](#).